

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

CASALETTO ESTATES, LLC,

v.

GEORGETOWN BOARD OF APPEALS

No. 01-12

DECISION

May 19, 2003

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

_____)	
CASALETTO ESTATES, LLC,)	
Appellant)	
)	
v.)	No. 01-12
)	
GEORGETOWN BOARD OF APPEALS,)	
Appellee)	
_____)	

DECISION

I. PROCEDURAL HISTORY

In July 2000, Casaletto Estates, LLC applied to the Georgetown Board of Appeals for a comprehensive permit to build 56 affordable townhouse condominium units at 102 Pond Street in Georgetown to be financed under the New England Fund (NEF) of the Federal Home Loan Bank of Boston. The Board opened a public hearing and held eleven sessions to consider the application. During these proceedings, in response to concerns raised by the Board, the developer changed its proposal to a subdivision of sixteen single-family houses on the 7.2-acre site.

On September 7, 2001, the developer filed an appeal with this Committee, requesting that it declare the constructive grant of a comprehensive permit for failure of the Board to close the hearing and render a decision. On September 24, 2001, the Committee conducted a conference of counsel, which included counsel for the parties and also counsel representing a

number of abutters and neighbors who had moved to intervene, and it issued an order remanding the matter to the Board for decision on a specified schedule.

The order of remand required the developer to submit to the Board an engineering or environmental report addressing the applicability of the Georgetown wetlands bylaw to any and all portions of the site. That report was in lieu of the Board's retaining a third-party environmental consultant, and was to specify any waivers of bylaw provisions being requested by the developer. The order also made it clear that issues arising under the state Wetlands Protection Act would be resolved independent of the comprehensive permit proceedings by the Georgetown Conservation Commission and the Massachusetts Department of Environmental Protection, pursuant to state law, regulations, and procedures.

Thereafter, the Board conducted further hearings and rendered a decision, which was filed with the town clerk on December 17, 2001, denying the comprehensive permit by a vote of three to two.

This Committee held a further conference of counsel on January 17, 2002, and four evidentiary hearing sessions were held. Following the presentation of evidence, counsel submitted post-hearing briefs.

II. JURISDICTION

The parties prepared a Joint Pre-Hearing Statement, in which the Board put the developer to its proof with regard to the three jurisdictional requirements found in 760 CMR 31.01(1), that is, that it be a limited dividend organization, that it control the site, and that the project be fundable by a subsidizing agency. Joint Pre-Hearing Statement, Exhibit C, § 1 (Apr. 18, 2002). The only question that was actively contested as a factual matter is that of

site control. See Joint Pre-Hearing Statement, Exhibit B, § 3; Tr. I, 37-38. At the outset of the hearing, however, counsel for the Board stipulated that the developer had a binding purchase and sale agreement for the site. Tr. I, 20; III, 70-78; IV, 6. Similarly, there is no doubt that the developer has agreed to limit its profits and that the project will receive financing from Middlesex Federal Savings, F.A., which is a member of the Federal Home Loan Bank of Boston (FHLBB), and that that financing will be under the New England Fund (NEF) of the FHLBB. Exh. 9, p. 2; Exh. 3-6, 82. The Board, however, raises the legal argument that this program is not a federal subsidy, but rather a private subsidy from a private lending institution.

This Committee examined the nature of the subsidy provided by the NEF in great detail in its decision in *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Decision on Jurisdiction, Housing Appeals Committee, Mar. 5, 1999). No evidence was introduced to show that the financing arrangement here differs in any significant way from that in *Barnstable*, and we will briefly summarize our earlier, much more detailed analysis, which applies equally here.¹

The inquiry into the eligibility of NEF proposals for comprehensive permits begins with the definition of “low or moderate income housing” since only developers proposing to build such housing qualify for such permits. G.L. c. 40B, § 21. Chapter 40B, § 20 defines such housing as “any housing subsidized by the

1. We note, however, that the Department of Housing and Community Development has implemented changes in the administrative structure within which the NEF exists in order to address concerns we raised in *Barnstable* (slip op. at 18) about enforcement mechanisms and other aspects of the NEF or similar programs that use private banks as financing intermediaries. See recent changes to 760 CMR 31.01(2)(g), 31.09(3).

federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute....”

The history of affordable housing in Massachusetts and the cases decided under the Comprehensive Permit Law show an evolution. In the late 1960s, the field was dominated by two organizations—the Massachusetts Housing Finance Agency (MassHousing) and the Federal Housing Administration—which had only a few programs. By the late 1970s, however, other agencies were also building housing, and as housing programs evolved, the Housing Appeals Committee adapted its procedures to the different administrative frameworks. See *Gordon v. Dennis*, No. 78-01 (Mass. Housing Appeals Committee Nov. 20, 1978)(Farmers Home Administration); *Berkshire East Assoc. v. Huntington*, No. 80-14 (Mass. Housing Appeals Committee Jun. 1, 1982)(Farmers Home Administration); *Daddario v. Greenfield*, No. 80-03, (Mass. Housing Appeals Committee June 15, 1981)(Farmers Home Administration), *aff’d*, 15 Mass. App. Ct. 553, 446 N.E.2d 748 (1983); *Crossroads Housing Partnership v. Barnstable*, No. 86-12, slip op. at 5-6 (Mass. Housing Appeals Committee Mar. 25, 1987) (Tax Exempt Local Loans to Encourage Rental Production program); *Stoneham Hts. Ltd. Partnership v. Stoneham*, No. 87-04, (Mass. Housing Appeals Committee Mar. 20, 1991)(Homeownership Opportunity Program). These cases provide ample precedent for a liberal application of our regulations to permit the entire comprehensive permit process to evolve in tandem with the changing world of housing subsidies. The affordable housing environment has changed particularly dramatically in recent years. Shallow subsidies and market-driven development have replaced the deep subsidies of the 1970s and 1980s. In the past, large grants or loans that constituted significant proportions of total development costs were provided by the state or federal government to local agencies

(such as local housing authorities) or, less frequently, to private developers. Today, however, there has been a significant shift throughout government toward market-driven approaches.

In this respect, the NEF is similar to the Department of Housing and Community Development's Local Initiative Program (LIP)(760 CMR 45.00) and MassHousing's Eighty/Twenty Rental Housing Program and Housing Starts program.

We believe that the NEF is the sort of affordable housing subsidy program that is crucial to current efforts to fill the need for affordable housing, and that an examination of the components of the statutory definition shows that housing built using the NEF is low or moderate income housing as defined by Chapter 40B.

1. "Construction" - Though NEF funds might well be used to make existing housing affordable, they certainly are also available for new construction, as is the case here.

2. "Low or Moderate Income Housing Program" - There are three fundamental criteria that must be met if housing is to be eligible for a comprehensive permit. They relate to the income level of its occupants, the proportion of housing within the development that is affordable, and the duration of the affordability requirements.

First, the housing must be for occupants whose income does not exceed 80% of the median income as established by U.S. Department of Housing and Urban Development (HUD) for the relevant Metropolitan Statistical Area. *Hastings Village, Inc. v. Wellesley*, No. 95-05, slip op. at 8 (Mass. Housing Appeals Committee Memorandum on Motion to Dismiss Mar. 21, 1996).² Second, though affordability is not required of *all* the housing units in a

2. We also note that this Committee looks to the Department of Housing and Community Development for guidance on matters of policy. DHCD policy as stated in its Subsidized Housing Inventory, particularly note 5(A)(1), also supports this proposition, though was not introduced into evidence here, as it was in the *Barnstable* case. As mentioned previously, for a more complete understanding of the issues presented here, please refer to our decision in that case.

development, a minimum of 25% of the units must normally be reserved for families at 80% of median income. See *Cedar Street Assoc. v. Wellesley*, No. 79-05, slip op. at 9 (Mass. Housing Appeals Committee Mar. 4, 1981), *aff'd*, 385 Mass. 651, 433 N.E.2d 873 (1982). Third, the housing must remain affordable for a fixed period of years (the "lock-in period"). *Lee Housing Authority v. Lee*, No. 89-08, slip op. at 6 (Mass. Housing Appeals Committee Dec. 18, 1989), *aff'd*, No. 90-00021 (Berkshire Super. Ct. June 29, 1990); *Daddario v. Greenfield*, *supra*.

The housing proposed here under the NEF meets these three requirements.

3. "Subsidized" - Funds for construction of the housing here will be loaned by the Middlesex Federal Savings, F.A., a member bank in the FHLB System, which, in turn will have borrowed the funds from the FHLBB. As we noted in *Hastings Village I*, the FHLBB receives no direct federal funding. *Andrews v. FHLB of Atlanta*, 998 F.2d 214, 215 (4th Cir. 1993). But financing will be provided at a low interest rate, and it is generally understood that "the funds handled by these banks are... public funds." *Fahey v. O'Melveny & Meyer*, 200 F.2d 420, 454 (9th Cir. 1951). Under similar circumstances, the Supreme Judicial Court has already noted that the word "subsidy" should not be limited to grants of money (the Black's Law Dictionary definition), but rather should include "[h]elp, aid, [or] assistance" generally. *Wellesley v. Housing Appeals Committee*, 385 Mass. 651, 655, 433 N.E.2d 873, 876 (1982); *Charlesbank Apartments, Inc. v. Boston Rent Control Admin.*, 379 Mass. 635, 637 n.4, 399 N.E.2d 1078, 1079 n.4. (holding that a federal program that merely provided mortgage insurance was a subsidy program under Boston's rent control ordinance). In *Wellesley*, the Court declared that MassHousing financing was a subsidy under Chapter 40B, noting that "[t]he intention of the Act [establishing MassHousing, St. 1966, c. 708] 'is to

make available mortgage financing at favorable interest rates to housing projects in which [at least] one quarter of the tenants will be in the “low income” category and the other tenants will be moderate income.... The savings in interest is to be applied in part... to making possible lower rentals to “low income” tenants, who may also receive the benefit of rent subsidies....’ *Massachusetts Housing Finance Agency v. New England Merchants Nat’l Bank*, 356 Mass. 2020, 209, 249 N.E.2d 599 (1969).” *Wellesley v. Housing Appeals Committee, supra*, at 655-656, 876. Also see 760 CMR 30.02, definition of “subsidy.”

The financing mechanism here is a public subsidy quite similar to MassHousing financing, and it constitutes a subsidy.

4. “Federal Government” - The Federal Home Loan Bank Act established the Federal Housing Finance Board (known prior to 1989 as the Federal Home Loan Bank Board) as “an independent agency in the executive branch of the Government.” 12 USC 1422a(a). The Federal Home Loan Bank System (a term specifically defined in the Act) in turn is made up of individual Federal Home Loan Banks, such as the FHLBB, which serve discrete geographical areas designated by the Federal Housing Finance Board. 12 USC 1422(2)(B), 1423; Stip. 6. These banks are “supervised” by the Federal Housing Finance Board. 12 USC 1422a(a)(3). Each Bank is a corporation owned by “member” banks, which have subscribed to its stock. 12 USC 1422(2)(A), 1424, 1426; Pre-Hearing Order (Nov. 17, 1998), p. 2, Stip. 7.

The federal courts have differed as to whether Federal Home Loan Banks are federal agencies. On the one hand, the Ninth Circuit Court of Appeals noted that “while Home Loan Banks are operated under carefully delineated private management,... they are governmental banking agencies.” *Fahey, supra*, at 454. They are “public banking agencies and

instrumentalities of the federal government” “organized to carry out public policy, [and their] functions are wholly governmental.” *Fahey, supra*, at 447, 446. Similarly, the District Court of Northern California found a Bank to be an agency under the Federal Administrative Procedure Act. *Fidelity Financial Corp. v. FHLB of San Francisco*, 589 F.Supp. 885, 894-895 (N.D.Cal. 1983), *aff'd*, 792 F.2d 1432 (9th Cir., 1986). The Appeals Court, however, in reviewing the decision, noted that there are both governmental and private aspects of the Bank, and then declined to rule on the issue. *Fidelity Financial Corp. v. FHLB of San Francisco*, 792 F.2d 1432, 1435-1436 (9th Cir., 1986). On the other hand, the Fourth Circuit Court of Appeals held that a Bank is “more like a private entity than... part of the federal government” for purposes of determining whether First Amendment rights apply to employees. *Andrews v. FHLB of Atlanta, supra*, at 216.

State law also recognizes that an organization may be “a hybrid entity, possessing attributes both of a private corporation and an executive agency of the Commonwealth.” *Dept. of Community Services v. Mass. State College Bldg. Auth.*, 378 Mass. 418, 425, 392 N.E.2d 1006, 1010 (1979); *Woods Hole v. Martha's Vineyard Commission*, 380 Mass. 785, 797, 405 N.E.2d 961, 969 (1980). We note that the MassHousing itself is “a body politic and corporate... not subject to the supervision or control of... any... agency of the commonwealth, [and] a public instrumentality... [performing] an essential governmental function.” St. 1966, c. 708, § 3. Since MassHousing is the prototypical subsidizing agency³ under the comprehensive permit law, it follows that the FHLBB's hybrid nature does not disqualify it.

3. See *Wellesley v. Housing Appeals Committee, supra*, at 654-656, 875-876.

The most important principle emerging from the above cases is that the same entity may be considered public or private depending on the context in which the issue arises. Thus, it is crucial “to look to the purpose of the provision at issue.....” *Okongwu v. Stevens*, 396 Mass. 724, 730-731, 488 N.E.2d 765, 769 (1986)(holding that the MBTA is not a state agency for purposes of Mass. Rule of Appellate Procedure 4(a), which concerns the time for filing of notice of appeal). And, “[w]hen [a term] of a statute is imprecise..., it is our duty to give the [term] a reasonable construction, taking into account the legislative purpose and the statute as a whole.” *MBTA Retirement Board v. State Ethics Commission*, 414 Mass. 582, 588, 608 N.E.2d 1052, 1055 (1993)(citation omitted, emphasis added) (approving the Commission's four-part test and holding a retirement board not to be a state agency within the state conflict of interest law).

There is no doubt that the intention of the legislature in enacting the comprehensive permit law was to create a flexible process that would assist in building low or moderate income housing using available financing mechanisms. See *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 347-355, 294 N.E.2d 393, 402-407 (1974). With this purpose as the context, we will examine the four factors discussed in *MBTA Retirement Board v. State Ethics Commission*, *supra*.

First, the FHLBB itself, though a hybrid entity, is clearly authorized legislatively. The NEF is not a separate entity, but a program within the Bank. Similar nationwide affordable housing programs, i.e., the Community Investment Program and the Affordable Housing Program, are specifically mandated by the statute. 123 USC 1430(i), (j). As a local New England program, the NEF draws its mandate from the FHLB System's general purpose “of providing funds for residential housing finance.” 12 USC 1430(a). Thus, the NEF has a

moderate amount of “legislative underpinning.” See *MBTA Retirement Board v. State Ethics Commission*, *supra*, at 589, 1056.

Second, we consider whether the FHLBB through the NEF performs some “essentially governmental function.” The provision of general banking services is probably not such a function. See *Andrews v. FHLB of Atlanta*, *supra*, at 219.⁴ Arguably, the FHLB System's overall function, supporting and stabilizing the “residential housing finance” market, is a governmental function, at least in some contexts. The more specialized function of the FHLBB NEF is to finance middle-income housing. In this case, the NEF will be used to finance new, long-term, low or moderate income housing. There is a shortage of such housing, and because financing for the construction of such housing has not traditionally been available in the private market, its provision is an essentially governmental function.

The third factor to be considered is whether NEF funds are public funds. Unlike the funds in *MBTA Retirement Board v. State Ethics Commission*, *supra*, at 591, 1057, there is no one who has a “private interest” in NEF funds, and we view these as public funds, as did the Court in *Fahey v. O'Melveny & Meyer*, *supra*.

Fourth is the question of governmental supervision. A federal agency, the Federal Housing Finance Board, “supervise[s] the Federal Home Loan Banks... to ensure that [they] carry out their housing finance mission.” 12 USC 1422a(a)(3)(B). This supervision, however, does not appear to include close, day-to-day supervision over the NEF. See *Hastings Village I*, slip op. at 19.

4. In *Andrews*, the Court says in no uncertain terms, “The functions performed by the Bank...—banking and bank examining—are not traditionally and exclusively public functions.” This statement, however, was made in the particular context of determining whether a Bank employee has First Amendment rights as an employee of the federal government.

Because the provision of affordable housing financing is an essentially governmental function, and also because of the NEF's legislative underpinnings, the public nature of the funds, and the supervision provided by the Federal Housing Finance Board, we conclude that, for purposes of the Comprehensive Permit Law, the FHLBB NEF is a program of the federal government.

III. MOTIONS TO INTERVENE

Frank and Monique Romito, owners of an abutting one-acre lot on which their home is located, moved to intervene in this matter pursuant to 760 CMR 30.04, and were permitted to participate fully in the hearing through counsel as *amici curiae*. They point out that a variance was required to permit construction of their home, and they question the legal effect of the modification or removal of a condition in that variance which would be necessary to permit the construction of affordable housing to proceed on the site. This unique and specific circumstance supports their intervention, and their motion is hereby granted.⁵

Other abutters also moved to intervene, alleging general concerns about drainage and impacts on the rural character of the surrounding area; their primary concerns were about the original, large, condominium development, not the smaller, single-family subdivision. See Tr. I, 85-86; Tr IV, 58-159; Tr. IV, 173-181. As is the Committee's custom, they were permitted to participate during the hearing as *amici*, and their counsel effectively presented argument in support of the Board's position, although he did not affirmatively introduce

5. Though it appears likely under the reasoning in *Woodridge Realty Tr. v. Ipswich*, No. 00-04 (Housing Appeals Committee Jen. 28, 2001) that both the Board and the Committee have the power to modify or remove a condition in a variance that permitted construction on an adjoining lot, because of the result we reach in this decision, we need not decide that question.

evidence, nor did he file a brief. See *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85, 653 N.E.2d 595, 598 (1995)(issues not briefed are waived). Counsel clearly accomplished what he intended in appearing for these abutters as *amici*, and there is no need under 760 CMR 30.04 to grant them the status of full interveners.

IV. ISSUES

The developer argues first that a comprehensive permit should be deemed to be constructively granted due to delays in the local hearing process. Second, it argues that even if we were not to conclude that the permit issued constructively, then a permit should issue since the Board has not proven any significant, substantive design flaws in the proposal. That is, it argues that it has established a *prima facie* case that the proposed housing complies with state and federal regulations and generally recognized standards, and that the Board has failed to prove that there are local concerns which support its denial of the permit and that those local concerns outweigh the regional need for housing. See 760 CMR 31.06(2), (6).

The Board argues first and foremost that the appeal must be dismissed as a matter of law since the town reached the statutory threshold of having 10% of its housing affordable.⁶

A. A comprehensive permit has not been granted constructively.

The developer argues that a permit should be deemed to have issued constructively due to unacceptable delays in the local hearing process, particularly with regard to a late request by the Board for further review of wetlands issues. The developer's application was

6. The Board's decision is to be upheld as a matter of law "in a city or town where... low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census...." G.L. c. 40B, § 20.

filed in July 2000. Though there are no wetlands on the site, there is a pond on an abutting property, and a small portion of the site is within the wetlands buffer zone under the Wetlands Protection Act. Exh. 18. This was disclosed in the application. Exh. 9, p. 9; Pre-Hearing Statement, § I-6 (filed Apr. 18, 2002). Issues regarding wetlands hydrology were first raised by the Board in September. Exh. 13; Tr. II, 139. In February 2001, the Georgetown Conservation Commission recommended independent review of the wetlands delineation. Exh. 54; Tr. II, 140-141. Not until August 2001, and then over the objections of the developer, did the Board decide to retain a wetlands scientist. Exh. 10-I, p. 9; 43; Tr. I, 114; II, 89. Eleven hearing sessions were held during this entire thirteen-month period. Pre-Hearing Statement, § I-5. Three weeks after the August hearing session, the developer filed an appeal with this Committee, alleging that the actions of the Board constituted sufficient delay so that a comprehensive permit should be deemed to have issued constructively. The Board responds that much of the delay and confusion during the local hearing resulted from the developer's failure to respond to requests for information.

The delays encountered in this case are clearly greater than would normally be considered acceptable. In most cases, Boards should act upon comprehensive permit applications within six months. See *Milton Commons v. Board of Appeals of Milton*, 14 Mass.App.Ct. 111, 115, 436 N.E.2d 1236, 1239 (1982).

If delay results from the Board's failure to issue a decision, the law is clear. Pursuant to G.L. c. 40B, § 21, a permit issues constructively 40 days after the last session at which interested parties can present information and argument. *Milton Commons, supra*, 115, 1239; *Pheasant Ridge Assoc. v. Town of Burlington*, 339 Mass 771, 783, 506 N.E.2d 1152, 1160 (1987). But we have less guidance when the delay is in the conduct of the hearing. As

the Court noted in *Pheasant Ridge Assoc. v. Town of Burlington*, *supra*, at 783, 1159, the “statute does not explicitly state a time from its filing within which the board of appeals must act on an application....” The Court went on to imply, in *dictum*, that delay during the hearing itself might result in constructive issuance of a permit.⁷ We believe, however, not only that in most cases would it be difficult for us to attempt to sort out the competing allegations concerning the delay, but also that it is unnecessary.

As we indicated in *Transformations, Inc. v. Townsend*, No. 02-14 (Housing Appeals Committee, Ruling on Motion for Summary Judgment Sep. 23, 2002), the developer has at least two options if it believes that delay has become excessive. If it believes that the hearing has ended, it can attempt to document that in order to start the clock running on the forty-day time limit. If, on the other hand, the Board will not end the hearing, it can appeal to this Committee. Before doing so, however, it should put the Board on notice that it believes that the hearing should be considered closed and a decision issued. In the most unambiguous and egregious situations, we may well have the power act on the Court’s implied suggestion in *Pheasant Ridge Assoc.*, and declare the permit to have issued constructively even before the forty-day period expires. But the better practice is for the developer to notify the Board that it considers the hearing closed, wait forty days without participating in further hearing sessions, and then apply for a comprehensive permit to be issued constructively.

In the case before us, at the August 2001 hearing session, the developer objected to beginning a new inquiry into wetlands issues thirteen months into the hearing, and the Board clearly indicated that it did not intend to close the hearing. Exh. 10-I, p. 9. The situation

7. “[For purposes of calculating the forty-day time limit, the date of the termination of the hearing] may be even earlier if the board of appeals has not conducted the public hearing expeditiously.” *Pheasant Ridge Assoc. v. Town of Burlington*, *supra*, at 783, 1160.

remained at an impasse, however, and the developer did not unambiguously demand that the hearing be closed, refuse to participate further, and give the Board forty days in which to render a decision. Exh. 10-I, p. 10. Under these circumstances, we believe that the proper approach is not to grant the permit constructively, but rather the more cautious approach that we took here, that is, to remand the matter to the Board on a fixed schedule, await the Board's decision, and if necessary resolve the substantive issues in the *de novo* appeal before this Committee.

B. The decision of the Board must be upheld as a matter of law because when it was issued, low or moderate income housing exceeded ten percent of the total housing stock in Georgetown.

The Comprehensive Permit law creates what is in effect an affirmative defense that may be asserted by the Board: "Requirements... shall be consistent with local needs when imposed... in a city or town where... low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest federal decennial census...." G.L. c. 40B § 20.⁸ The Board argues that as a result of an August 2001 change in the regulations governing the counting of housing units, the town had reached this threshold when it issued its decision and that therefore its decision is consistent with local needs as a matter of law. The developer, on the other hand, contends that applying the new regulatory provision in the case at hand would be an improper, retroactive application since its application for a comprehensive permit was filed well before the regulatory change.

8. We have noted in the past that the statutory requirement should be treated as an affirmative defense to be raised and proven by the Board. See, e.g., *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 2 n.1 (Housing Appeals Committee Sep. 27, 2001).

The regulatory framework for the calculation of each community's progress toward the ten percent threshold is provided in 760 CMR 31.04(1), which refers to the Department of Housing and Community Development's (DHCD's) Subsidized Housing Inventory (the Inventory). At the time that Casaletto Estates filed its comprehensive permit application, the town was below the threshold, and the regulation provided that only new affordable units "occupied, available for occupancy, or under building permit shall be counted." 760 CMR 31.04(1)(a). In November 2001, the Board approved a 186-unit rental development at Norino Way under the Comprehensive Permit Law. Exh. 38; Tr. IV, 41-43. Though this is clearly a sufficient number of units to bring the town over the ten percent threshold,⁹ pursuant to the regulation in effect at the time of application, these 186 units would not have counted for quite some time—until building permits were issued. But on August 31, 2001, the relevant provision of the regulation was changed by adding the following: "In addition, housing units authorized by a comprehensive permit shall be counted when the comprehensive permit becomes final...." 760 CMR 31.04(1)(a). Under *this* regulation, since there is no evidence that the Norino Way permit was appealed, the 186 units would count immediately.¹⁰ Though there is no doubt that for administrative purposes the regulation went into effect when promulgated, and in that sense the Norino Way units counted immediately in November 2001, the question remains as to whether they should be counted for purposes of

9. There was testimony that 13.4% of the town's housing is now low or moderate income housing. Tr. IV, 43.

10. An appeal would have extended the date on which the permit became final. 760 CMR 31.08(4). The Norina Way units would cease to count after a year if building permits were not issued within that time. 760 CMR 31.04(1)(a). There is no evidence that that is the case here, however, nor is it likely if that were the case that it would affect the application of the affirmative defense to a decision issued during that first year, when the Norina Way units were still being counted.

applying the statutory affirmative defense to the decision of the Board issued in this case in December 2001.¹¹

This question cannot be answered, as the developer would have us do, by simply stating the maxim that only laws and regulations relating to procedure, and not those affecting substantive rights, are commonly treated as operating retroactively, that is, as applying to pending actions or causes of action. See *Fontaine v. Ebtac Corp.*, 415 Mass 309, 319, 613 N.E.2d 881, 888 (1993). “[T]he rule is far easier to state than it is to apply....” *City Council of Waltham v. Vinciullo*, 364 Mass. 624, 626, 307 N.E.2d 316, 318 (1974). We agree with the developer that the regulation is substantive in that how units are counted affects the substantive rights of the parties. See *Fontaine, supra*, at 319, 888. But nevertheless, retroactivity is a question of legislative (and regulatory) intent, and for several reasons we conclude that the new regulations should be applied.

First, we look to the statute itself. The Comprehensive Permit Law says, “Requirements... shall be consistent with local needs *when* imposed....” G.L. c. 40B, § 20 (emphasis added). The natural reading of this is that the town’s progress is to be measured on the date the decision is rendered. Admittedly the use of the word “when” is not without ambiguity. The sentence continues, “when imposed by a board of zoning appeals after comprehensive hearing....,” and it is possible, as the developer argues, that “when” was not intended in the temporal sense, but rather to indicate “if.” But even in that case, in the absence of any other indication in the statute as to when the test should be applied, we

11. The developer has not argued, and we do not believe that the filing of this appeal in September—before the Norina Way permit was issued—has any legal significance. As will be seen, we believe that the critical date is the date that the Board actually issued its decision in this case, which, since we have not found constructive issuance, is clearly December 17, 2001, even though that was as the result of an order of this Committee, rather than in the normal course.

believe that the plain meaning of the sentence supports the interpretation that the test should be applied when the Board decision is issued. That is, changing “when” to “if” results in the following: “Requirements... shall be consistent... if imposed... in a town where... housing exists which is in excess of ten percent....” Because “exists” is in the present tense, the most natural reading of the statute, regardless of how the regulations might be interpreted, is that the town’s progress should be measured when the restrictions are imposed, that is, at the time that the decision is rendered.¹²

Further, we do not believe that applying the new regulation to the case before us is in fact retroactive application. In this case, unlike *Fontaine*, the developer’s application for a comprehensive permit does not establish a clearly defined claim or cause of action. The developer has right to file such an application (and the Board may grant a permit) whether the town is above or below the ten percent threshold. *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553, 554, 446 N.E.2d 748, 749 (1983). Though there is certainly some continuity from the local application through the *de novo* appeal, they are two separate processes, and a developer might well choose to pursue an application at the local level even knowing in advance that the town had reached the threshold and that therefore no appeal would lie. The developer’s right to an appeal before this Committee arises only when the application is denied, and the counting provisions come

12. There is sometimes confusion as to exactly on what date a decision is rendered. The board’s decision may be voted on one day, and the written document signed on another. Though not explicitly required by the statute, it is common practice for the board to file the document with the town clerk, and it may deliver the decision to the applicant on yet another date. Chapter 40B, § 22 establishes the time for appeal as “within twenty days after the date of the notice of the decision....” Our regulations provide additional guidance by indicating that the decision is to be memorialized in writing, and filed in the office of the city or town clerk. 760 CMR 30.06(8). It is this date that is most likely to be unambiguous and clearly documented.

into effect only in abrogation of that right. Thus, it is the developer's *appeal* rights that are limited by the new regulation, and the claim or pending case to which the new regulations are being applied is the appeal, which arose when the Board's decision was issued—after the regulation change took effect.

Finally, we look to the possible intention of DHCD as reflected in the regulatory language itself. The history of the part of our regulations that establish the methodology used in performing the percentage calculation is complicated and murky. Section 31.04(1)(a) controls the numerator of the percentage calculation, that is, countable Chapter 40B units. Section 31.04(1)(b) controls the denominator, the total housing units in the municipality. From 1974 until 1991, both §§ 31.04(1)(a) and 31.04(1)(b) indicated that the count was to include units on the Inventory and any additional units permitted prior to the developer's application to the local board. The clear inference of this was that the application date was to be controlling in determining whether a decision of a local board was consistent with local needs.

In 1991, however, § 31.04(1)(a) was changed substantially, and with regard to Chapter 40B units, the reference to the date of application was removed. "It can be assumed that new legislation alters existing law." *Morrison v. Lennet*, 415 Mass. 857, 863, 616 N.E.2d 92, 96 (1993). The removal of the reference to the date of application may well have reflected a desire to change the controlling date so that when a municipality faces several applications that are filed nearly simultaneously, it does not have to bear the burden of having all of the applications appealable even though granting of only one or two would be sufficient to take it to the ten percent threshold. That is, in promulgating the regulations, DHCD may have intended to shift the advantage to municipalities, even though a developer would prefer

to see the application date remain as the benchmark lest it run the risk—as happened here—of other proposals being permitted before the decision on its application is rendered.

The last puzzle posed by the counting regulations is the possibility that using the decision date rather than the application date for the counting of affordable units results in a logical inconsistency in the overall counting methodology in the regulations. Under our reading of § 31.04(1)(a), the Chapter 40B units in the Norino Way developments count (in the numerator—to the town’s benefit) as soon as the notice of decision with regard to them issued. But § 31.04(1)(b) is unchanged, and continues to provide that only units which are under building permit as of the date of the Casaletto Estates application may be added to the total housing stock in making the Inventory calculation. Thus, none of the approved units count in the denominator to the developer’s benefit.

We acknowledge that simply from a commonsense point of view it might seem more logical if both the affordable units and the total units from these new developments were added to the inventory at the same time. But just because the scheme is complicated does not mean that it is illegal nor that we should read § 31.04(1)(a) differently. In fact, it may be argued that a very similar sort of illogic exists intentionally in the statute itself. The statute makes no mention of adding any units built after the latest decennial census to the total-units figure in the denominator for the computation. That is, read simply, the statute gives the town credit in the numerator for whatever Chapter 40B affordable units “exist” when it renders its decision, including recently added affordable units, but establishes the latest decennial census as a constant. Thus, it might be argued, the proper way to eliminate the inconsistency would be to revise § 31.04(1)(b) so that it is more consistent with the statute, that is, so that no units are added to the denominator at all except when census new figures

are issued. This, however, is a question that we do not need to address at present.

Finally, the Court's opinion in *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553, 554, 446 N.E.2d 748, 749 (1983), appears on first glance to be relevant to the issues at hand. The Court states the question presented as involving counting procedures "at the time of the developer's application to the board." In that case, however, "[n]o attack [had] been made on the validity of regulation § 31.04(1)(a)," and the Court relied heavily on that regulation, quoting it at length. *Id.* at 559, 752. Since the decision and reasoning of the Court was necessarily based on the language in the pre-1991 regulation, it has no applicability to the question we face under the new regulation. Further, the Court's comments about the date on which the counting was performed are *dictum*. There were no other applications pending before the local board as there were here, and we see no intention by the court to address the issue presented in the case before us.

For all these reasons, we conclude that the date that should be used in determining whether a particular decision of the Board is consistent with local needs is the date that decision is filed with the town clerk. The developer does not dispute that at that time Georgetown exceeded the ten percent threshold. Therefore, we conclude that as a matter of law the decision of the Board denying the Comprehensive Permit is consistent with local needs and must be upheld. G.L. c. 40B, § 20.

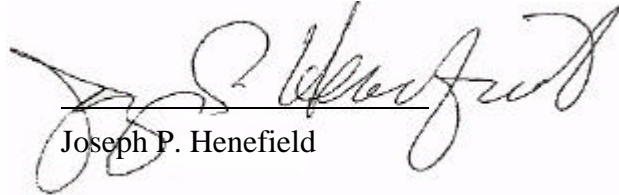
This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee


Dated: May 19, 2003



Werner Lohe, Chairman



Joseph P. Henefield



Marion V. McEttrick



Frances C. Volkmann